SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III, AND THE STATE OF NORTH CAROLINA AND THE CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, EX REL., AND FOR THE USE AND BENEFIT OF J. M. LEDBETTER, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF ROBERT L. STEELE, III,

Petitioners,

vs.

FARMERS BANK & TRUST COMPANY, A CORPORATION, AND FEDERAL RESERVE BANK OF RICHMOND, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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GUTHRIE, PIERCE & BLAKENEY,
Of Counsel.

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Petitioners,

vs.

FARMERS BANK & TRUST COMPANY, a Corporation, and FEDERAL RESERVE BANK OF RICHMOND, a Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari issue to review the decision of the Circuit Court of Appeals for the Fourth Circuit entered in the above entitled cause on April 11, 1944 (not yet reported below)

affirming the orders of His Honor, Johnson J. Hayes, District Judge, rendered August 26th, 1943 and September 28, 1943. This petition was filed the seventeenth day of June, 1944.

Summary Statement of the Matter Involved.

Petitioners instituted this action in the Superior Court of Richmond County, North Carolina (R. 1), and after its removal to the United States District Court, respondents moved to dismiss the action for failure of the complaint to state a claim on which relief could be granted against them (R. 9 & 10).

The following facts were alleged in the complaint: On March 14, 1939, Robert L. Steele, III, was the owner of about 2,500 acres of land in Bladen County, North Carolina, on which there were growing several million feet of valuable timber and on which there were valuable buildings, sawmills and machinery and approximately two and one-half million feet of sawed and processed lumber (R. 3). Both the land and the lumber and other property had theretofore been mortgaged to the respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond (R. 3). On the 14th day of March, 1939, the respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond applied to the Superior Court of Bladen County for the appointment of a receiver of the said properties of Robert L. Steele, III, and asked the Court to appoint the defendant J. R. McQueen as receiver (R. 3). The defendant McQueen was appointed receiver (R. 3). At the time of his appointment, the defendant McQueen was insolvent and the respondents knew or reasonably should have known such to be the case (R. 4). At the time of the appointment of the defendant McQueen as receiver, the respondents suggested to the Court

that the Court should fix the bond of the receiver at $10,000.00. A $10,000.00 bond was inadequate and reasonably appeared at that time to be inadequate (R. 6). The Court, because of the suggestion of the respondents, fixed the bond of the receiver at $10,000.00.

While the defendant McQueen was acting as receiver, he was in fact acting as the agent of the respondents for he acted "in conformity to the desires and directions" of respondents and "not with an impartial and independent discretion" (R. 3).

On April 21, 1939, the defendant McQueen placed a fireman in charge of the boilers whom he knew, or reasonably should have known, to be careless, incompetent and incapable of discharging the duties of a fireman (R. 4). On April 21, 1939, the defendant McQueen had allowed the doors of the furnace and fireboxes to become defective, and he knew, or reasonably should have known, that they were defective so that fire was likely to escape and become communicated to the woodshavings and other inflammable material and spread to the sawmill, buildings, machinery, lumber and other property in the vicinity (R. 4). The defendant McQueen had failed to provide efficient waterhose and firefighting equipment, and the defendant McQueen had failed to obtain and keep in effect fire-insurance on said properties (R. 5). On April 21, 1939, as a result of the negligence of the defendant McQueen and as a result of the negligence of the fireman in charge of the boilers at the Steele plant, fire escaped from the fireboxes and was communicated to the buildings, sawmill, machinery, lumber and other valuable property and did completely consume the same (R. 4).

The district court granted the motion of respondents to dismiss the action on August 26, 1943 and dismissed the action as to respondents as to any claim for relief against them (R. 10 & 11).

On the 8th day of September 1943, petitioners moved the court for leave to amend the complaint by adding to paragraph nine of the complaint a clause alleging that the failure of the defendant McQueen to insure was directly and proximately caused by wrongful interference on the part of the defendants Farmers Bank & Trust Company and Federal Reserve Bank of Richmond in the handling and management of the aforesaid receivership, in that they instructed the defendant McQueen as receiver not to obtain fire insurance covering the aforesaid properties until they, the defendant Banks, should advise him as to how and with what insurance company he could obtain fire insurance at a rate they considered to be desirable; that the defendant McQueen as receiver wrongfully complied with such instructions from the defendant Banks and failed, as stated above, to obtain any fire insurance which would have produced indemnity for the loss and destruction of the aforesaid property which thereafter occurred, as stated above, on or about April 21, 1939 (R. 11 & 12).

On September 28th, 1943, the District Court denied the motion of petitioners for leave to amend on the ground that the motion was not made within ten days of the dismissal of the case as to petitioners, and on the further ground that no new matter was alleged on which relief could be granted petitioners against respondents Farmers Bank & Trust Company and Federal Reserve Bank of Richmond (R. 13).

From the order of dismissal granted August 26, 1943 and from the order refusing petitioners leave to amend entered September 28th, 1943, petitioners appealed to the Circuit Court of Appeals for the Fourth Circuit. The case was argued in the Circuit Court of Appeals on March 14, 1944, and on April 11th, 1944, the Circuit Court of

Appeals filed an opinion affirming the action of the District Court (R. 17-23).

Jurisdiction.

By the provisions of Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U. S. C. A., Sec. 347) this Court has jurisdiction to review by certiorari any case in a Circuit Court of Appeals "with the same power and authority and with like effect as if the cause had been brought * * * [here] by unrestricted writ of error or appeal." The decision of the Circuit Court of Appeals in this case was entered on the eleventh day of April, 1944, and this petition was filed on the seventeenth day of June, 1944.

Questions Presented.

1. Whether a motion to amend a complaint after the action has been dismissed for failure to state a claim on which relief can be granted is a motion for a new trial within the meaning of Rule 59 (a) of the Rules of Civil Procedure and must be served within ten days of the entry of the dismissal?

2. Whether if such motion is not a motion for a new trial within the meaning of Rule 59 (a) but is a motion under Rule 15 (a) or Rule 60 (b), the Circuit Court of Appeals is justified in conclusively presuming that the motion was denied in the discretion of the District Court when the District Court has stated that the motion was denied because it was not served within ten days and did not state a claim on which relief could be granted?

3. Whether under the North Carolina law the plaintiffs-mortgagees in a receivership action are liable to the defendant-mortgagor for losses occasioned by the malfeas-

ance or misfeasance of the receiver and his insolvency and the insufficiency of his bond?

4. Whether, where, as in this case (regardless of what the rule in North Carolina may be in ordinary receivership cases), the receiver is the *alter ego* of the plaintiffs-mortgagees and is operating under their direction and control, is insolvent and was insolvent to the knowledge of the plaintiffs-mortgagees at the time they suggested his appointment and suggested the fixing of his bond at $10,000 which then appeared to be inadequate, the plaintiffs-mortgagees are liable to the mortgagor for the losses resulting from the misfeasance or malfeasance of the receiver and the insufficiency of his bond?

5. Whether (regardless of what the rule may be in ordinary receivership cases in North Carolina) the plaintiffs-mortgagees are liable to the mortgagor, where, as in this case, the failure of the receiver to be protected by insurance was caused by the instructions and directions of the plaintiffs-mortgagees?

Reasons Relied On for Allowance of the Writ.

A. The Circuit Court of Appeals held that a motion to amend the complaint after the action was dismissed for failure to state a claim upon which relief can be granted was controlled by Rule 59 (b), Rule 15 (a), or Rule 60 (b) (R. 19). The Court of Appeals for the District of Columbia in *Safeway Stores* v. *Coe,* 78 U. S. App. D. C. ——, 136 F. 2d 771, 57 U. S. P. Q. 516, held, one judge dissenting, that a motion to vacate a judgment was a motion for a new trial within the meaning of Rule 59. The Circuit Court of Appeals for the First Circuit, with some hesitation, in *Jusino, et al.* v. *Morales & Tio,* 139 F. 2d 946, held that a motion to vacate a judgment is a motion for a new trial

under Rule 59. The Circuit Court of Appeals for the First Circuit in *United States* v. *Newberry Manufacturing Company*, 123 F. 2d 453, stated that a motion for leave to amend after an action had been dismissed for failure to state a claim on which relief can be granted is a motion under Rule 60 (b). The question as to which rule controls a motion for leave to amend after dismissal and a motion to vacate a judgment is an important question of Federal procedure about which there is much confusion in the lower Federal Courts and which has not been decided by this Court (though the decision of this court in *Leishman* v. *Associated Electric Company*, 318 U. S. 203, 63 S. Ct. 543, 87 L. ed. 714 indicates that this motion is not controlled by Rule 59).

B. The Circuit Court of Appeals in the instant case held that, if the motion to amend were controlled by Rule 15 (a) or Rule 60 (b), the District Court was properly exercising his discretion in refusing petitioners leave to amend even though the District Court held that the refusal was bottomed on the failure of petitioners to allege anything additional in the proposed amendment on which relief could be granted and because the motion was not served within ten days (R. 13). The question of whether the action of the District Court should be affirmed as a proper exercise of his discretion when he denied the motion on legal grounds is an important question of Federal procedure which has not been decided by this court. This decision is probably in conflict with decisions in which the Sixth Circuit Court of Appeals held that where a district judge denied a motion which was within his discretion for want of power or failed to exercise his discretion, the decision was reviewable.

C. In this case, the Circuit Court of Appeals for the Fourth Circuit failed to follow applicable local decisions.

1. The Supreme Court of North Carolina follows the weight of authority. *In Re Steele* (1942), 220 N. C. 685, 18 S. E. 2d 132.

(a) The weight of authority is to the effect that he who controls a third person is liable for his torts regardless of whose servant the third person is (35 Am. Jur. 970, Sec. 541); and this is in accordance with the decision of the Supreme Court of North Carolina in *Shapiro, Adm.* v. *Winston-Salem* (1938), 212 N. C. 751, 194 S. E. 479, holding the converse of this.

Furthermore, the Supreme Court of North Carolina held *in Dillon, Administratrix,* v. *City of Winston-Salem, et al.,* (1942), 221 N. C. 512, 20 S. E. 2d 845, that the person who controls a third person is liable for his torts regardless of whether or not that person is his servant.

Had the Circuit Court of Appeals followed the weight of authority (and hence followed what is presumably the North Carolina law) and the *Dillon Case,* it would have held that the plaintiffs-mortgagees were liable for the loss of the property in the hands of the receiver, for it is alleged (R. 3, 5) that he was acting under the directions and control of the mortgagees.

(b) Outside of North Carolina there are only six cases with holdings on the liability of the mortgagor and mortgagee for the loss of property while it is in the hands of a receiver appointed by a court. They are *Kaiser* v. *Keller* (1866), 21 Iowa 95; *Robinson* v. *Arkansas Loan & Trust Co.* (1905), 75 Ark. 292, 85 S. E. 413; *Sorchan* v. *Mayo* (1892), 50 N. J. Eq. 288, 23 Atl. 479; *Livingston* v. *Bauchens* (1938), 254 App. Div. 692, 3 N. Y. S. 2d 776; *Terrell* v. *Ingersoll* (1882), 78 Tenn. (10 Lea) 77, and *Downs* v. *Allen* (1882) 78 Tenn. (10 Lea) 652. Of these cases, *Terrell* v. *Ingersoll* and *Downs* v. *Allen* hold that the plaintiff is liable for all fail-

ures of the receiver to do his duty. *Sorchan* v. *Mayo* and *Livingston* v. *Bauchens* hold that the plaintiff mortgagee is liable to the mortgagor for the loss of property by the receiver; *Kaiser* v. *Keller* and *Robinson* v. *Arkansas Loan & Trust Company* hold the contrary, but both of those cases are distinguishable from this case.

Had the Circuit Court of Appeals followed the weight of authority (and hence followed what is presumably the North Carolina law) it would have held that the plaintiffs-mortgagees were liable for the loss of the property in the hands of the receiver.

(c) The Circuit Court of Appeals held that the matter alleged in the amendment petitioners proposed to make to their complaint did not state a valid claim (R. 19). In the amendment plaintiffs sought to make, they alleged that the respondents wrongfully instructed the receiver not to take out any insurance until such time as they should instruct him to do so, and that the receiver complied with these instructions and failed to take insurance that would have produced indemnity for the loss [1] (R. 11 & 12). Lord Justice Bowen in *Donovan* v. *Laing; etc. Construction Syndicate* (1893), I Q. B. (Eng.) 629, said: "* * * if the hirer [of a coach] actively interferes with the driving, and injury occurs to anyone, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of." This language was quoted with approval by Circuit Judge Taft in *Byrne* v. *Kansas City, etc. R. Co.*, 61 Fed. 605, 22 U. S. App. 220, 9 C. C. A. 666, 24 L. R. A. 693, and in *Frerker* v. *Nickolson*, 41 Colo. 12, 92 P. 224, 14 Ann. Cas. 930, 13 L. R. A. (N. S.) 1122. To like effect are *Burgess Brothers Company* v. *Stewart*, 112 Misc. 347, 184 N. Y. S.

[1] The receiver is negligent if he fail to insure. 2 Glenn, *Mortgages* 980, Sec. 188.2. See *Thompson* v. *Phenix Ins. Co.*, 136 U. S. 237, 34 L. ed. 408, 412, 10 S. Ct. 1019.

199, affirmed 194 App. Div. 913, 185 N. Y. S. 85, and *Adams* v. *Cook*, 91 Vt. 281, 100 A. 42. Had the Circuit Court of Appeals followed the weight of authority, it would have held that the amendment stated a claim on which relief can be granted.

Furthermore, as we pointed out above (p. 6), the Supreme Court of North Carolina has held that the person who controls a third person is liable for his torts regardless of the question of agency. *Dillon, Administratrix,* v. *City of Winston-Salem, et al.,* (1942), 221 N. C. 512, 20 S. E. 2d 845. It would certainly seem, in the light of that decision, that since the very factor which caused the loss (the failure to take insurance) was directly caused by the control exercised over the receiver by the mortgagees, the mortgagees would be liable.

2. The holding of the Circuit Court of Appeals in this case was, in effect, that a receiver is conclusively presumed to be "an indifferent person between parties" (R. 21) and by sustaining the dismissal, they refused to allow petitioners to prove that the receiver in this case was the *alter ego* of the mortgagees. The Supreme Court of North Carolina looks at the reality of a situation rather than at the form.[2] Hence, had the Circuit Court of Appeals followed applicable local decisions, it would have held that petitioners had a right to prove that the receiver was in reality acting as an agent of the mortgagees and under their direction and control, as alleged in the complaint (R. 3).

3. In *Vanstory* v. *Thornton* (1883), 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483, the Supreme Court of North Caro-

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[2] *Unemployment Compensation Commission* v. *Coal Co.* (1939), 216 N. C. 6, 3 S. E. 2d 290; *Mills* v. *Mutual Building & Loan Association* (1940), 216 N. C. 664, 6 S. E. 2d 549; *Smith* v. *Greensboro Joint Stock Land Bank* (1938), 213 N. C. 343, 196 S. E. 481; *Peedin* v. *Oliver* (1943), 222 N. C. 665, 24 S. E. 2d 519.

lina held that the plaintiff in a receivership action must suffer the loss caused by the failure of the receiver appointed at his instance to pay over money in his hands. In that case, the receiver had given no bond. See in connection with this case *Thornton* v. *Lambeth*, 103 N. C. 86, 9 S. E. 432, and *Vanstory* v. *Thornton*, 110 N. C. 10, 14 S. E. 637.

For the reasons herein stated, it is respectfully submitted that the writ of certiorari prayed for should be granted.

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